FOLEY
HOAG LLP
ATTORNEYS AT LAW

George B. Dean
Boston Office
617-832-1219
gdean@foleyhoag.com

June 20, 2005

Via Courier

Mary L. Cottrell
Secretary
Department of Telecommunications & Energy
One South Station
Boston, MA 02110

Re: D.T.E. 04-113 Boston Edison Company -- 2004 Reconciliation Filing

Dear Secretary Cottrell:

Enclosed for filing in the above referenced proceeding on behalf of the the Massachusetts Water Resources Authority ("MWRA") are comments on the new Rate WR tariff filed by Boston Edison Company. I have also enclosed a certificate of service.

Thank you for your attention in this matter and please contact me at the number above if you have any questions about this filing or if I can provide any further information.

Sincerely,

George B. Dean

cc: Robert N. Werlin
Colleen McConnell

B3051371.1

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Boston Edison Company	)	**D.T.E. 04-113**

MASSACHUSETTS WATER RESOURCES AUTHORITY COMMENTS ON BOSTON EDISON COMPANY'S PROPOSED REVISIONS TO RATE WR

I. INTRODUCTION

On June 16, 2005, the Department of Telecommunications and Energy ("Department") held a technical conference at its offices in order to facilitate its investigation of changes proposed by Boston Edison Company ("Edison" or "the Company") to the terms of the tariff for Rate WR that the Company had filed on December 7, 2004 and which the Department had approved in an order dated December 29, 2004. The Department's technical conference followed the Company's earlier response to an information request[1] in which it: (1) explained that the Rate WR tariff that had earlier been filed and approved was not consistent with the terms of a 2002 settlement agreement between the Company, the Massachusetts Water Resources Authority ("MWRA"), and the Attorney General (the "01-108 Settlement Agreement"),

[1] As discussed *infra*, p. 4, the Company made three separate but related filings with the Department concerning the discrepancy between the rates in the Rate WR tariff that had been filed and approved earlier and the rates called for under the 01-108 Settlement Agreement.

and (2) included a new, revised version of the Rate WR tariff, incorporating changes to applicable rates with a proposed effective date of January 1, 2005.

During the course of that technical conference, the Department solicited information from the Company about the derivation of the proposed changes to the Rate WR tariff and requested that the Company provide supplemental information on the impact of the proposed rate change, both with and without the additional impact of a rate changes under consideration in D.T.E. 05-44. That information was provided on June 17, 2005.

Pursuant to the directive by the Hearing Officer that written comments on NSTAR's proposal be filed on or before June 22, 2005, MWRA submits these comments.

For the reasons set forth herein, although the MWRA has reviewed the information submitted by the Company in support of the proposed changes to the currently effective terms of Rate WR and, based on that information, believes that the substance of the proposed changes is consistent with the provisions of the 01-108 Settlement Agreement, the MWRA submits that the Department must reject the Company's request that these rate changes be approved for effect on January 1, 2005. Massachusetts law is clear: the Department may not award a rate increase retroactively. Absent special circumstances, not present here, Massachusetts law proscribes retroactive ratemaking. The Department simply may not allow the Company to back-bill a customer for usage that has already been billed under the rates that were then approved and in effect for such service.

II. Background

Rate WR is the tariffed rate applicable to the service provided by the Company to the MWRA's sewerage treatment facilities on Deer Island. Under the terms of the 01-108 Settlement Agreement, Rate WR is to be modified over time to implement a phased-in increase in the "Transition Cost" component of that rate.[2] In particular, the 01-108 Settlement Agreement calls for an increase, phased-in over ten years, in the proportion of the so-called "Uniform Transition Cost Charge" to be included in Rate WR. The 01-108 Settlement Agreement provided that, unless the Department determined otherwise, beginning in 2005, Rate WR was to include an unbundled "Transition Cost Charge" set as a proportion of the Uniform Transition Cost Charge that would remain fixed from 2005 through 2007.[3]

On December 7, 2004, Edison made its annual reconciliation filing with the Department, which consisted of a reconciliation of its transition, transmission, standard offer service and default service costs and revenues as well as updated charges and tariffs to be effective on January 1, 2005. By order dated December 29, 2004, the Department approved the new tariffs and rate changes, effective January 1, 2005. Notwithstanding the terms of the 01-108 Settlement, the new Rate WR tariff proposed by Edison and approved by the Department did not include an unbundled "Rate WR

[2] The 2002 01-108 Settlement Agreement was entered to resolve a dispute between the MWRA and the Company about the appropriate level of transition costs to be included in Rate WR.

[3] Attachment C to the 01-108 Settlement Agreement specifies that the Rate WR Transition Charge is to be set at proportions of the Uniform Transition Charge fixed separately for the two periods: 2005-07 and 2008-10. As reported on Exhibit BEC-HCL-3, page 11A (revised), the Rate WR Transition Charge for the first of these two periods is to be set at a level equal to 84.6 percent of the Uniform Transition Charge. Based on the information reported in that exhibit, it appears that Rate WR Transition Charge will then increase to a level equal to 90.7 percent of the Uniform Transition Charge for the second period, before increasing to 100 percent of the Uniform Transition Charge in 2011.

Transition Cost Charge" and the level of the "Rate WR Transition Cost Adjustment" was not fixed at 84.6 percent of the "Uniform Transition Cost Charge" as specified under terms of the 01-108 Settlement Agreement.

During the course of responding to an information request from the Department, the Company discovered the discrepancy between the terms of the Rate WR tariff filed by the Company and the terms of the 01-108 Settlement Agreement. The Company reported this discrepancy in a May 18, 2005 response to a Department information request. Under cover a letter also dated May 18, 2005, the Company made a separate filing with the Department in which it submitted "replacement pages" for the Rate WR Tariff that incorporated changes to include an unbundled Rate WR Transition Cost Charge fixed at 84.6 percent of the Uniform Transition Cost Charge, but retained the earlier effective date of January 1, 2005. The Company also included these "replacement pages" in a June 10, 2005, supplemental response to a Department information request that was the subject matter of the Department's June 16, 2005 technical conference. The "replacement pages" filed with the Department on May 18 and again on June 10 were not formally served upon the MWRA before Sunday, June 11, 2005.

The changes included in the Company's "replacement pages" would increase the rates paid under Rate WR by $218,761 for the period from January through May, 2005, and by $386,433 for the period from January through December, 2005. Response to IR DTE-1-13 (Second Supplemental) Attachment D.T.E. 1-13(d).[4]

[4] While the tabulations included in the Company's second supplemental response to IR DTE-1-13 show only the retroactive rate increase for usage through the end of May ($218, 761), given that the proposed new rates have not yet been approved, a more accurate measure of the impact of the proposed retroactive

III. Argument

The Department must reject the Company's request to have the proposed changes to the Rate WR tariff applied retroactively to January 1, 2005. The proposed changes increase the rates to be paid under Rate WR and Massachusetts law is clear that the Department may not award a rate increase retroactively. *Boston Edison Company v. Department of Public Utilities*, 375 Mass. 1, 6 (1978), *cert. denied*, 439 U.S. 921; *Fitchburg Gas & Electric Light Company v. Department of Telecommunications and Energy*, 440 Mass. 625, 637, 801 N.E.2d 220, 230 (2004). There are limited exceptions to the rule against retroactive rate changes for usage under previously approved rates, but those exceptions do not apply here.

The rule against retroactive ratemaking is well settled in Massachusetts. It has been described both as a corollary of the so-called "filed rate doctrine," which forbids regulated entities from charging any rate other than the then effective rate on file with the relevant regulatory authority, *see Town of Framingham*, D.T.E. 02-46, p. 7 (2003), and as based on "the statutory construction of G.L. 164, § 94." *Fitchburg, supra. See* G.L. c. 164, § 94 ("*until the effective date* of any such change *no different rate, price or charge shall be charged, received or collected* by the company filing such a schedule *from those specified in the schedule then in effect*"). The rule prohibits both retroactive rate increases as well as retroactive "reparations" or rebates. *City Of Newton v. Department Of Public Utilities*, 367 Mass. 667, 677-78, 328 N.E.2d 885, 890-91(1975); *Metropolitan District Commission v. Department of Public Utilities*, 352 Mass. 18, 224 N.E.2d 502 (1967).

---

increase would be to include an estimate of the impact for June usage, which would increase the impact by $6,809 to $225,571.

The rule against retroactive ratemaking applies with equal force to changes in a utility's overall level of rates and to changes in the rates in individual tariffs. In *New England Telephone Company*, D.P.U. 84-238 (1985), the Department held that the rule against retroactive ratemaking prohibited the retroactive application of the rates in a newly approved tariff to services rendered earlier to a single customer under the terms of a to be superseded general tariff. There, the Department made clear that even in this narrow circumstance, such backbilling is retroactive ratemaking and, as such, prohibited:

> the backbilling proposed by NET clearly constitutes retroactive ratemaking in that the Company proposes to bill at new rates for a service which was provided in the past under an effective tariff. As the Attorney General correctly argues, the Department is prohibited from engaging in retroactive ratemaking.

Id. p. 14. The backbilling proposed here by Edison is the same and it, too, should be rejected by the Department.

While there are limited exceptions to the rule against retroactive ratemaking, those exceptions apply to specific circumstances -- reconciling cost recovery adjustments where "retroactivity is inherent in the[ir] very nature," *Fitchburg Gas & Electric Light Company v. Department of Telecommunications and Energy*, 440 Mass. at 638, 801 N.E.2d at 230; *Consumers Organization for Fair Energy Equality, Inc. v. Department of Public Utilities*, 368 Mass. 599, 605-607, 345 N.E.2d 341, 345-346 (1975); and claims for overcharges resulting from billings under the wrong tariff for the service provided, *Metropolitan District Commission v. Department of Public Utilities*, 352 Mass. 18 at 27, 224 N.E.2d at 509 -- circumstances which are not present here. There is no claim that the Rate WR tariff filed in December was not the appropriate tariff to apply to the service provided by Edison to the MWRA's Deer Island facility

and, while the Company's overall transition cost revenues are to be reconciled over the extended period in which its recovers its so-called "stranded costs," it is clear that the transition cost component of Rate WR is not itself a reconciling adjustment. It is to be calculated as a fixed percentage of the "Uniform Transition Cost Charge" and there is no reconciliation of the revenues received thereunder to any particular level of costs.

Moreover, of particular importance here, in light of the Company's apparent view that the terms of the 01-108 Settlement Agreement create "superseding requirements" that transcend the rule against retroactive ratemaking, May 18, 2005 Letter from Robert N. Werlin to Secretary Cottrell enclosing "replacement pages," it should be emphasized that the rule against retroactive ratemaking is a legal restriction on the Department's authority that may not be overcome by contract. In *New England Telephone*, *supra*, the Department rejected the utility's proposal to rebill under newly approved rates, notwithstanding the customer's agreement "to pay backcharges retroactively..." As the Department explained, this outcome was required because "the Department is constrained by legal restrictions set forth in" *Boston Edison Company v. Department of Public Utilities*, *supra*; *Newton v. Department of Public Utilities*, *supra*. D.P.U. 84-238, at 14. That same restriction applies here and the Department must reject the Company's proposal.

Finally, in anticipation that the Company may assert, notwithstanding the language of G.L. c. 164, § 94 and the weight of precedent to the contrary, that there is some implicit exception to the rule against retroactive ratemaking that permits retroactive correction of clerical errors in the rates specified in approved tariffs, the MWRA submits that no such exception exists and, even if it did, that it would not extend

to the circumstances here. The Company has proposed substantive changes to Rate WR. These changes do not involve the correction of a transposition of numbers or some other typographical error. Rather, they involve the implementation of a significant increase in rates, accomplished through an unbundling of individual rate elements and a change in the methodology used to determine the level of one of those rate elements. Rate changes of this sort surely do not fall within any alleged "routine corrective" exception to the rule against retroactive ratemaking.

IV. CONCLUSION

WHEREFORE, for all of the forgoing reasons, the MWRA urges the Department to reject the Company's proposal that the proposed changes to Rate WR be applied retroactively and to, instead, direct Edison to apply the changes only to prospective usage from the date of the Department's approval of such changes.

Respectfully submitted,
MASSACHUSETTS WATER
RESOURCES AUTHORITY

By its attorneys,

Steven A. Remsberg (GBD)
Steven A. Remsberg
General Counsel

George B. Dean
Foley Hoag LLP

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS
AND ENERGY

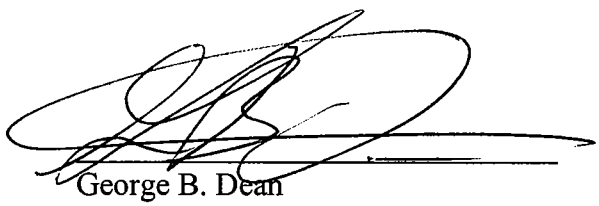
Boston Edison Company	)	**D.T.E. 04-113**

CERTIFICATE OF SERVICE

I, George B. Dean, attorney for Massachusetts Water Resources Authority, hereby certify that I have served a copy of Massachusetts Water Resources Authority Comments on Boston Edison Company's Proposed Revisions to Rate WR by first-class mail, postage prepaid, to:

Robert N. Werlin, Esquire
Keegan, Werlin LLP
265 Franklin Street
Boston, MA 02110-3113

Colleen McConnell, Esquire
Assistant Attorney General
Office of the Attorney General
One Ashburton Place
Boston, MA 02108



George B. Dean
Foley Hoag LLP
World Trade Center West
155 Seaport Boulevard
Boston, MA 02210-2600
(617) 832-1219

Dated: June 22, 2005